DEPARTMENT OF STATE REVENUE

04-20100186.SLOF

Supplemental Letter of Findings: 04-20100186
Use Tax
For the Year 2007

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ISSUES

I. Use Tax – Recreational Vehicle.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-8.1-5-1; 45 IAC 2.2-3-4; Gregory v. Helvering, 293 U.S. 465 (1935); Comm'r v. Transp. Trading & Terminal Corp., 176 F.2d 570 (2nd Cir. 1949); Horn v. Comm'r, 968 F.2d 1229 (D.C. Cir. 1992); Lee v. Comm'r, 155 F.3d 584 (2d Cir. 1998).

Taxpayer protests the imposition of Indiana use tax on the use of a recreational vehicle.

II. Tax Administration – Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; 45 IAC 15-11-2.

Taxpayer protests the imposition of negligence penalty.

STATEMENT OF FACTS

The Indiana Department of Revenue ("Department") determined that in 2006 Taxpayer purchased a recreational vehicle ("RV") in Kentucky and had been using the RV in Indiana without having paid sales tax in any jurisdiction. As a result, the Department issued a proposed assessment for use tax, ten percent negligence penalty, and interest. Taxpayer protests that the RV was purchased and titled by a Montana LLC, of which Taxpayer and his wife are the sole members, and that no Indiana use tax is due.

Taxpayer's protest was administratively closed when he did not participate in the scheduled hearing. However, Taxpayer's protest was later reopened for supplemental proceedings when Taxpayer cited to family medical reasons for missing the hearing. A supplemental administrative process ensued which results in this Supplemental Letter of Findings. Further facts will be supplied as required.

I. Use Tax – Recreational Vehicle.

DISCUSSION

Taxpayer protests the imposition of use tax on the use and storage of an RV in Indiana. The Department imposed use tax after determining that Taxpayer had been using and storing the RV in Indiana and that no sales tax had been paid on the purchase of the RV. Taxpayer protests that the RV was titled by a Montana LLC and that all legal documents establishing the existence of the LLC were properly filed in Montana. Taxpayer also argued that it "was under the assumption that no tax is due Indiana when the referenced vehicle is used as a second home in states other than Indiana for the duration of four (4) months and one (1) day in each year."

The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

The sales tax is imposed by IC § 6-2.5-2-1, which states:

(a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.

(b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

The use tax is imposed under IC § 6-2.5-3-2(a), which states:

(a) An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

Also, 45 IAC 2.2-3-4 provides:

Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

Therefore, when tangible personal property is acquired in a retail transaction and is stored, used, or consumed in Indiana, Indiana use tax is due if sales tax has not been paid at the point of purchase. The Department determined that Taxpayer purchased the RV in Kentucky in a retail transaction on November 11, 2007, and as a resident of Indiana, stored or used the RV in Indiana but did not pay sales tax anywhere. The Department therefore issued proposed assessments for use tax.

Prior to the hearing Taxpayer was sent an email dated August 12, 2010 that listed a number of questions and documentation he needed to present to the Department in support of his protest. Taxpayer provided some of the LLC's documentation showing that the RV was owned by the LLC and titled in Montana, as well as the LLC's operating agreement. Taxpayer also provided some cancelled checks from years after the period at issue

demonstrating that the RV was outside of Indiana for periods of time every year. Taxpayer also provided a notarized statement by friends in Florida who attested that the RV was parked on their property from around October to January every year for the last few years. During the course of the phone hearing, Taxpayer stated that the RV was always in LaBelle, FL during January, February, and March, and in Palatka, FL for October, November, and December. When they are not traveling, Taxpayer and his wife reside in Indiana.

The Role of the Montana LLC

Taxpayer states that the Montana LLC's legal documents were properly filed by a Montana attorney and the fact the RV is owned by the LLC alleviates Taxpayer of the duty to pay sales tax on its purchase of the RV.

The LLC's operating agreement states that the general purpose of the LLC is primarily investing in real and personal property in Montana and in any other lawful business. Taxpayer gave no indication that the LLC has done anything but own the RV in question.

While the LLC made no attempt to undertake any other business activity, the titling of the RV by the LLC did have a significant impact on Taxpayer's sales taxes. This leads to consideration of the "sham transaction" doctrine, which is long established both in state and federal tax jurisprudence dating back to Gregory v. Helvering, 293 U.S. 465 (1935). In that case, the Court held that in order to qualify for favorable tax treatment, a corporate reorganization must be motivated by the furtherance of a legitimate corporate business purpose. Id. at 469. A corporate business activity undertaken merely for the purpose of avoiding taxes was without substance and "[T]o hold otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose." Id. at 470.

The courts have subsequently held that "in construing words of a tax statute which describe [any] commercial transactions [the court is] to understand them to refer to transactions entered upon for commercial or industrial purposes and not to include transactions entered upon for no other motive but to escape taxation." Comm'r v. Transp. Trading & Terminal Corp., 176 F.2d 570, 572 (2nd Cir. 1949), cert. denied, 338 U.S. 955 (1950). "[T]ransactions that are invalidated by the [sham transaction] doctrine are those motivated by nothing other than the taxpayer's desire to secure the attached tax benefit" but are devoid of any economic substance. Horn v. Comm'r, 968 F.2d 1229, 1236-7 (D.C. Cir. 1992). In determining whether a business transaction was an economic sham, two factors can be considered; "(1) did the transaction have a reasonable prospect, ex ante, for economic gain (profit), and (2) was the transaction undertaken for a business purpose other than the tax benefits?" Id. at 1237. The question of whether or not a transaction is a sham, for purposes of the doctrine, is primarily a factual one. Lee v. Comm'r, 155 F.3d 584, 586 (2d Cir. 1998).

The RV's Presence in Indiana

As stated above, Taxpayer also argues that it "was under the assumption that no tax is due Indiana when the referenced vehicle is used as a second home in states other than Indiana for the duration of four (4) months and one (1) day in each year." Taxpayer has not cited to any statutes, regulations, or Indiana cases that support this contention. Indiana will give credit to Taxpayer for any sales tax it has paid in another jurisdiction against its use tax obligation to Indiana, but there are no Indiana laws that apply a partial-year analysis to the obligation to remit use tax to Indiana.

The documentation Taxpayer has provided indicates that while the RV may well have been outside Indiana for several months every year, there is no documentation that shows where the RV is during the spring and summer months.

Therefore, based on all the above, the Department's presumption that the RV was used and/or stored in Indiana where Taxpayer and his wife resided is not overcome.

FINDING

Taxpayer's protest is respectfully denied.

II. Tax Administration – Negligence Penalty.

DISCUSSION

Taxpayer also protested the imposition of the ten percent negligence penalty pursuant to IC § 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2(b) clarifies the standard for the imposition of the negligence penalty as follows:

> Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The standard for waiving the negligence penalty is given at 45 IAC 15-11-2(c) as follows:

> The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be

considered in determining reasonable cause include, but are not limited to:

(1) the nature of the tax involved;
(2) judicial precedents set by Indiana courts;
(3) judicial precedents established in jurisdictions outside Indiana;
(4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc;
(5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Ignorance of the law is treated as negligence under 45 IAC 15-11-2 (b), which states:

"Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

(Emphasis added).

Taxpayer has not affirmatively established that it had reasonable cause for not remitting use tax to Indiana in this instance.

FINDING

Taxpayer's protest is respectfully denied.

SUMMARY

Taxpayer's protest of the assessment of use tax and penalty on the Taxpayer's presumed use of the subject RV in Indiana are denied.

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